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Date: October 25, 2005	Phone Number	Fax Number
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From: Kevin J. Zilka		

Docket No.: ABE1P002

App. No:10/644,944

Total Number of Pages Being Transmitted, Including Cover Sheet: 26

Message:

Please deliver to the Board of Patent Appeals & Interferences.

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Kevin J. Zilka

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Practitioner's Docket No. ABE1P002

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of: John R. Abe

Application No.: 10/644,944

Group No.: 3629

Filed: 08/19/2003

Examiner: Woo, Richard

For: CONTINUOUS PRICE OPTIMIZATION SYSTEM, METHOD AND COMPUTER PROGRAM
PRODUCT FOR SATISFYING CERTAIN BUSINESS OBJECTIVES

Mail Stop Appeal Briefs - Patents

Commissioner for Patents

P.O. Box 1450

Alexandria, VA 22313-1450

TRANSMITTAL OF APPEAL BRIEF
(PATENT APPLICATION-37 C.F.R. § 41.37)

1. Transmitted herewith, in triplicate, is the APPEAL BRIEF in this application, with respect to the Notice of Appeal filed on August 24, 2005.
2. STATUS OF APPLICANT

This application is on behalf of a small entity. A statement was already filed.

10/26/2005 HDEMESS1 00000043 501351 10644944

01 FC:2402 250.00 DA

CERTIFICATION UNDER 37 C.F.R. §§ 1.8(a) and 1.10*

(When using Express Mail, the Express Mail label number is mandatory;
Express Mail certification is optional.)

I hereby certify that, on the date shown below, this correspondence is being:

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37 C.F.R. § 1.8(a)

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37 C.F.R. § 1.10*

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Date:

10/25/2005

Signature

Erica L. Farlow

(type or print name of person certifying)

* Only the date of filing (' 1.6) will be the date used in a patent term adjustment calculation, although the date on any certificate of mailing or transmission under ' 1.8 continues to be taken into account in determining timeliness. See ' 1.703(f). Consider "Express Mail Post Office to Addressee" (' 1.10) or facsimile transmission (' 1.6(d)) for the reply to be accorded the earliest possible filing date for patent term adjustment calculations.

Transmittal of Appeal Brief--page 1 of 2

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3. FEE FOR FILING APPEAL BRIEF

Pursuant to 37 C.F.R. § 41.20(b)(2), the fee for filing the Appeal Brief is:

small entity \$250.00

Appeal Brief fee due \$250.00

4. EXTENSION OF TERM

The proceedings herein are for a patent application and the provisions of 37 C.F.R. § 1.136 apply.

Applicant believes that no extension of term is required. However, this conditional petition is being made to provide for the possibility that applicant has inadvertently overlooked the need for a petition and fee for extension of time.

5. TOTAL FEE DUE

The total fee due is:

Appeal brief fee \$250.00

Extension fee (if any) \$0.00

TOTAL FEE DUE \$250.00

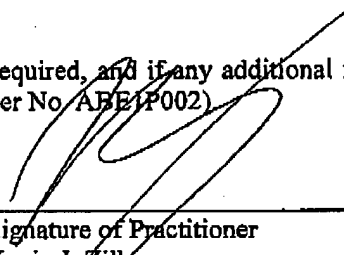
6. FEE PAYMENT

Authorization is hereby made to charge the amount of \$250.00 to Deposit Account No. 50-1351 (Order No. ABE1P002).

A duplicate of this transmittal is attached.

7. FEE DEFICIENCY

If any additional extension and/or fee is required, and if any additional fee for claims is required, charge Deposit Account No. 50-1351 (Order No. ABE1P002).

Reg. No.: 41,429
Tel. No.: 408-971-2573
Customer No.: 28875

Signature of Practitioner
Kevin J. Zilka
Zilka-Kotab, PC
P.O. Box 721120
San Jose, CA 95172
USA

Transmittal of Appeal Brief—page 2 of 2

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PATENTIN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re the application of:)
John R. Abe) Group Art Unit: 3629
Application No. 10/644,944) Examiner: Woo, Richard
Filed: 08/19/2003) Atty. Docket No. ABE1P002
For: CONTINUOUS PRICE) Date: October 25, 2005
OPTIMIZATION SYSTEM, METHOD)
AND COMPUTER PROGRAM)
PRODUCT FOR SATISFYING)
CERTAIN BUSINESS OBJECTIVES)

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

ATTENTION: Board of Patent Appeals and Interferences**APPEAL BRIEF (37 C.F.R. § 41.37)**

This brief is in furtherance of the Notice of Appeal, filed in this case on August 24, 2005.

The fees required under § 1.17, and any required petition for extension of time for filing this brief and fees therefor, are dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

This brief contains these items under the following headings, and in the order set forth below (37 C.F.R. § 41.37(c)(i)):

- I REAL PARTY IN INTEREST
- II RELATED APPEALS AND INTERFERENCES
- III STATUS OF CLAIMS
- IV STATUS OF AMENDMENTS

- V SUMMARY OF CLAIMED SUBJECT MATTER
- VI ISSUES
- VII ARGUMENTS
- VIII APPENDIX OF CLAIMS INVOLVED IN THE APPEAL
- IX APPENDIX LISTING ANY EVIDENCE RELIED ON BY THE APPELLANT
IN THE APPEAL

The final page of this brief bears the practitioner's signature.

I REAL PARTY IN INTEREST (37 C.F.R. § 41.37(c)(1)(i))

The real party in interest in this appeal is John R. Abe.

II RELATED APPEALS AND INTERFERENCES (37 C.F.R. § 41.37(c) (1)(ii))

With respect to other prior or pending appeals, interferences, or related judicial proceedings that will directly affect, or be directly affected by, or have a bearing on the Board's decision in the pending appeal, an appeal noted on August 31, 2005 in application serial number 10/644,949 may be, but is not necessarily, related.

Since no decision(s) has been rendered in such proceeding(s), no Related Proceedings Appendix is appended hereto.

III STATUS OF CLAIMS (37 C.F.R. § 41.37(c) (1)(iii))

A. TOTAL NUMBER OF CLAIMS IN APPLICATION

Claims in the application are: 1, 3, 4, 6-9, 11-13 and 17-40

B. STATUS OF ALL THE CLAIMS IN APPLICATION

1. Claims withdrawn from consideration: None
2. Claims pending: 1, 3, 4, 6-9, 11-13 and 17-40
3. Claims allowed: None
4. Claims rejected: 1, 3, 4, 6-9, 11-13 and 17-40

C. CLAIMS ON APPEAL

The claims on appeal are: 1, 3, 4, 6-9, 11-13 and 17-40

See additional status information in the Appendix of Claims.

IV STATUS OF AMENDMENTS (37 C.F.R. § 41.37(c)(1)(iv))

As to the status of any amendment filed subsequent to final rejection, there are no such amendments after final.

V SUMMARY OF CLAIMED SUBJECT MATTER (37 C.F.R. § 41.37(c)(1)(v))

With respect to a summary of Claim 1 et al., as shown in Figure 1B, a computer-implemented method for utilizing feedback in generating an optimal price is provided including generating an optimal price, utilizing a processor of a computer system, wherein the optimal price is generated by receiving a plurality of prices associated with a price-frequency mathematical distribution, a number of competitors, a business objective, and a cost associated with a good or service, via an input device coupled to the processor of the computer system (e.g. items 208, 216, 220, etc. of Figure 2, for example), and calculating the optimal price based on the prices, number of competitors, business objective, and cost associated with the good or service, utilizing the processor of the computer system. In addition, an expected result of utilizing the optimal price is identified, utilizing the processor of the computer system which is reacted to by adjusting the price-frequency mathematical distribution based on a difference between the expected result and an actual result, utilizing the processor of the computer system (e.g. Figure 1B). Furthermore, the optimal price is output for aiding in achieving the business objective, utilizing an output device coupled to the processor of the computer system. Note pages 12-14, for example.

VI ISSUES (37 C.F.R. § 41.37(c)(1)(vi))

Following, under each issue listed, is a concise statement setting forth the corresponding ground of rejection.

Issue # 1: The Examiner has rejected Claims 1, 3-4, 6-9, 11-13, 17-19, 21-23 and 32-40 under 35 U.S.C. 112, as being incomplete for omitting essential steps.

Issue # 2: The Examiner has rejected Claims 1, 3-4, 6-9, 11-13, 17-19, and 21-40 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which appellant regards as the invention.

Issue # 3: The Examiner has rejected Claims 1, 3-4, 6, 8-9, 11-13, 17-25, 27, 32, 29 and 40 under 35 U.S.C. 102(e) as being anticipated by Delurgio et al., U.S. Patent No. 6,553, 352.

Issue # 4: The Examiner has rejected Claims 7, 26, 28-31 and 33-38 under 35 U.S.C. 103(a) as being unpatentable over Delurgio et al., U.S. Patent No. 6,553, 352.

VII ARGUMENTS (37 C.F.R. § 41.37(c)(1)(vii))

The claims of the groups noted below do not stand or fall together. In the present section, appellant explains why the claims of each group are believed to be separately patentable.

Issue # 1:

The Examiner has rejected Claims 1, 3-4, 6-9, 11-13, 17-19, 21-23 and 32-40 under 35 U.S.C. 112, as being incomplete for omitting essential steps.

Group 1: Claims 1, 3-4, 6-9, 11-13, 17-19, 21-23 and 32-40

The Examiner has stated that appellant has omitted any step to further limit and describe the step of reacting. Appellant respectfully disagrees. However, in the spirit of expediting prosecution, appellant has amended such associated claims to clearly state that the reacting is accomplished "by adjusting the price-frequency mathematical distribution based on a difference between the expected result and an actual result." The foregoing rejection is thus deemed moot.

Issue # 2:

The Examiner has rejected Claims 1, 3-4, 6-9, 11-13, 17-19, and 21-40 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which appellant regards as the invention.

Group # 1: Claims 1, 3-4, 6-9, 11-13, 17-19, and 21-40

The Examiner has stated that the recitation of reacting renders the claim indefinite because it is not clear to what the invention is reacting, or with what the invention should be reacting. Appellant respectfully asserts that such claim clearly states "reacting by adjusting the price-frequency mathematical distribution based on a

difference between the expected result and an actual result.” and therefore the reacting is accomplished by adjusting the price-frequency, as claimed.

Furthermore, the Examiner has stated that it is not clear how receiving the data (prices, number of competitors, etc.) further describe the step of generating an optimal price. Appellant again respectfully disagrees. Appellant respectfully asserts that such data is received in order to “calculat[e] the optimal price,” based on the data. Specifically, see appellant’s claimed:

“and calculating the optimal price based on the prices, number of competitors, business objective, and cost associated with the good or service, utilizing the processor of the computer system” (see Claim 1 et al.).

Issue # 3:

The Examiner has rejected Claims 1, 3-4, 6, 8-9, 11-13, 17-25, 27, 32, 29 and 40 under 35 U.S.C. 102(e) as being anticipated by Delurgio et al., U.S. Patent No. 6,553, 352.

Group # 1: Claims 1, 3-4, 6, 8-9, 11-13, 17-25, 27, 32, 29 and 40

With respect to each of the independent claims, the Examiner has relied on the following excerpts from Delurgio to make a prior art showing of appellant’s claimed “generating an optimal price, utilizing a processor of a computer system, wherein the optimal price is generated by receiving a plurality of prices associated with a price-frequency mathematical distribution, a number of competitors, a business objective, and a cost associated with a good or service, via an input device coupled to the processor of the computer system” (see the same or similar language in each of the independent claims).

“The present invention provides a superior technique for configuring optimization scenarios, determining a set of optimum prices corresponding to the scenarios, and displaying the set of optimum prices for multiple sets of highly related products within a product category. Contrasted with present day

optimization systems that consider only gross figures in their respective optimizations, prices according to the present invention can be optimized to maximize merchandising figures of merit (e.g., net profit) that take into account demand chain costs associated with the products.

In one embodiment, an interface is provided enabling a user to determine optimum prices of products for sale. The interface includes a scenario/results processor that enables a user to prescribe an optimization scenario, and that presents the optimum prices to the user. The optimum prices are determined by execution of the optimization scenario, where the optimum prices are determined based upon estimated product demand and calculated activity based costs. The scenario/results processor has an input/output processor and a scenario controller. The input/output processor acquires data corresponding to the optimization scenario from the user, and distributes optimization results to the user, where the data is acquired from the user over the Internet via a packet-switched protocol. The scenario controller is coupled to the input/output processor. The scenario controller controls acquisition of the data and the distribution of the optimization results in accordance with a price optimization procedure." (col. 3, lines 37-64-emphasis added)

"Examples of the types of activity based costs for products that are calculated by the activity based cost engine 235 include bag costs, checkout labor costs, distribution center inventory costs, invoicing costs, transportation costs, and receiving and stocking costs." (col. 8, lines 41-45)

"Each of the tools 304, 306, 308, 310, 312 include provisions for determining optimum lever parameters for the maximization of cost-based merchandising figures of merit such as net profit." (col. 9, lines 41-44)

Appellant respectfully asserts that the above excerpts from Delurgio simply teach that optimum prices are determined based on estimated product demand and calculated activity based costs (see emphasized excerpt above). Clearly estimated product demand and activity based costs do not meet appellant's claimed "number of competitors, a business objective, and a cost associated with a good or service".

In addition, Delurgio does not even suggest any sort of generation of an optimal price based on "a price-frequency mathematical distribution," as claimed. After a careful review of Delurgio, it is strongly noted that Delurgio is completely deficient in this regard. The Examiner should not confuse Delurgio's mention of "...estimated product demand..." as being the same as "receiving a plurality of prices associated with a price-frequency mathematical distribution" (see each of the independent

claims). As one of ordinary skill would understand, an "estimated product demand" in this context is a historical relationship of price to the number of units sold of a product by the supplier attempting to optimize price. For example, an estimated demand for the supplier attempting to optimize price could be that if the supplier prices at \$1, the supplier historically sold 10,000 units, and if the supplier prices at \$1.10, the supplier historically sold 9,500 units, and so on.

In contrast, a price-frequency mathematical distribution is a frequency count of prices (e.g. competitor prices, etc.) observed. So, for example, a price-frequency mathematical distribution may optionally be as follows: price a product 100 times at \$1, 120 times at \$1.10, 150 times at a \$1.20, and so on.

Thus, a "price-frequency mathematical distribution" is not the same as an "estimated demand." The two terms refer to completely different relationships.

Furthermore, the Examiner has completely failed to even consider appellant's claimed "calculating the optimal price based on the prices, number of competitors, business objective, and cost associated with the good or service, utilizing the processor of the computer system" (see the same or similar language in each of the independent claims).

With respect to the claimed "number of competitors," for example, the significance of this omission is clear when considering the following example. If a supplier determines the optimal price to sell their product is \$35.00 with a single competitor, the presence of twenty competitors would result in the supplier's optimal price being likely lower. Delurgio's disclosure is completely void of any language referencing the number of competitors. Thus, an allowance or a specific prior art showing of such claim language is respectfully requested.

The Examiner has also relied on Figure 6 of Delurgio to meet appellant's claimed "identifying an expected result of utilizing the optimal price" (see the same or similar language in each of the independent claims). However, such display merely depicts

currently defined scenarios corresponding to a particular client (see Col. 12, lines 39-41). Such scenarios do not include "an expected result", as claimed by appellant.

Additionally, the Examiner has also not addressed appellant's claimed "reacting by adjusting the price-frequency mathematical distribution based on a difference between the expected result and an actual result, utilizing the processor of the computer system." Again, an allowance or a specific prior art showing of such claim language is respectfully requested.

Finally, the Examiner has relied on Figure 26 of Delurgio to meet appellant's claimed "outputting an optimal price for aiding in achieving the business objective" (see the same or similar language in each of the independent claims). However, there is simply no mention of "aiding in achieving the business objective," in the context claimed by appellant.

The Examiner is reminded that a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described in a single prior art reference. *Verdegaal Bros. v. Union Oil Co. Of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). Moreover, the identical invention must be shown in as complete detail as contained in the claim. *Richardson v. Suzuki Motor Co.* 868 F.2d 1226, 1236, 9USPQ2d 1913, 1920 (Fed. Cir. 1989). The elements must be arranged as required by the claim.

This criterion has simply not been met by the Delurgio reference, and therefore the rejection should be withdrawn.

Issue # 4:

The Examiner has rejected Claims 7, 26, 28-31 and 33-38 under 35 U.S.C. 103(a) as being unpatenable over Delurgio et al., U.S. Patent No. 6,553, 352.

Group # 1: Claims 7, 26, 28-31 and 33-38

Such claims are deemed allowable for the reasons base Claims 1, 19 and 20 are deemed allowable.

In view of the remarks set forth hereinabove, all of the independent claims are deemed allowable, along with any claims depending therefrom.

VIII APPENDIX OF CLAIMS (37 C.F.R. § 41.37(c)(1)(viii))

The text of the claims involved in the appeal (along with associated status information) is set forth below:

1. (Previously Amended) A computer-implemented method for utilizing feedback in generating an optimal price, comprising:
generating an optimal price, utilizing a processor of a computer system, wherein the optimal price is generated by receiving a plurality of prices associated with a price-frequency mathematical distribution, a number of competitors, a business objective, and a cost associated with a good or service, via an input device coupled to the processor of the computer system; and calculating the optimal price based on the prices, number of competitors, business objective, and cost associated with the good or service, utilizing the processor of the computer system;
identifying an expected result of utilizing the optimal price, utilizing the processor of the computer system;
reacting by adjusting the price-frequency mathematical distribution based on a difference between the expected result and an actual result, utilizing the processor of the computer system; and
outputting the optimal price for aiding in achieving the business objective, utilizing an output device coupled to the processor of the computer system.
2. (Cancelled)
3. (Original) The method as recited in claim 1, wherein the result includes units sold.
4. (Previously Amended) The method as recited in claim 1, wherein the result includes a revenue term.
5. (Cancelled)

6. (Original) The method as recited in claim 1, wherein the result includes a gross profit.
7. (Previously Amended) The method as recited in claim 1, where in the result includes an expected win-rate calculated based on the price-frequency mathematical distribution and the number of competitors
8. (Original) The method as recited in claim 1, wherein the result includes earnings before income tax (EBIT) for each price.
9. (Original) The method as recited in claim 1, and further comprising: computing a frequency distribution of a plurality of prices.
10. (Cancelled)
11. (Previously Amended) The method as recited in claim 109, and further comprising: calculating at least one result selected from the group consisting of units sold, revenue, a gross profit, a factory utilization, a market penetration, and earnings before income tax (EBIT) for each price, wherein the at least one result is stored in a table.
12. (Original) The method as recited in claim 11, and further comprising: searching the table for the optimum price that optimizes a user-selected business objective.
13. (Previously Amended) The method as recited in claim 12, wherein the business objective is selected from the group consisting of maximizing revenue for a good or service, maximizing gross profit for the good or service, maximizing factory utilization for the good or service, achieving a desired market share for the good or service, and maximizing earnings before income tax (EBIT) for the good or service.

14.- 16. (Cancelled)

17. (Previously Amended) The method as recited in claim 1, and further comprising: if it is determined that the optimization is required, identifying a new price value by re-computing the price-frequency mathematical distribution so as to minimize the difference between the actual and expected results, wherein the operations are repeated based on the new price value.

18. (Original) The method as recited in claim 1, wherein the method is carried out utilizing a frequency distribution engine, a probability of win engine, an expected results engine, an optimization update engine, and a legacy system interface.

19. (Previously Amended) A computer program product embodied on a computer readable medium for utilizing feedback in generating an optimal price, comprising:

computer code for generating an optimal price, utilizing a processor of a computer system, wherein the optimal price is generated by receiving a plurality of prices associated with a price-frequency mathematical distribution, a number of competitors, a business objective, and a cost associated with a good or service, via an input device coupled to the processor of the computer system; and calculating the optimal price based on the prices, number of competitors, business objective, and cost associated with the good or service, utilizing the processor of the computer system;

computer code for identifying an expected result of utilizing the optimal price;

computer code for reacting by adjusting the price-frequency mathematical distribution based on a difference between the expected result and an actual result, utilizing the processor of the computer system; and

computer code for outputting the optimal price;

wherein the computer code is executed on the processor of the computer system for aiding in the achievement of the business objective.

20. (Previously Amended) A system for utilizing feedback in generating an optimal price, comprising:

a processor for generating an optimal price, identifying an expected result of utilizing the optimal price, wherein the optimal price is generated by receiving a plurality of prices associated with a price-frequency mathematical distribution, a number of competitors, a business objective, and a cost associated with a good or service, via an input device coupled to the processor; and calculating the optimal price based on the prices, number of competitors, business objective, and cost associated with the good or service; and

an output device coupled to the processor, the output device outputting the optimal price;

wherein the computer code is executed utilizing the processor for aiding in the achievement of the business objective.

21. (Previously Presented) A method as recited in claim 1, wherein a graphical user interface is included.

22. (Previously Presented) A method as recited in claim 21, wherein the graphical user interface is adapted for inputting the business objective.

23. (Previously Presented) A method as recited in claim 21, wherein the graphical user interface is included for inputting the competitor prices and the number of competitors.

24. (Previously Presented) A method as recited in claim 20, wherein the price-frequency mathematical distribution is used to estimate the competitor prices.

25. (Previously Presented) A method as described in claim 20, wherein the price-frequency distribution is estimated using the set of competitor prices.

26. (Previously Presented) A method as described in claim 20, wherein the price-frequency mathematical distribution is converted to an expected probability of a customer purchase based on the number of competitors.
27. (Previously Presented) A method as recited in claim 20, wherein the price-frequency mathematical distribution is converted to a table of prices with a frequency of a price within the table corresponding to the price-frequency mathematical distribution.
28. (Previously Presented) A method as recited in claim 27, wherein each price, probability of a customer purchase, and cost-per-unit are used to form a income/operational statement for each member of a plurality of prices.
29. (Previously Presented) A method as recited in claim 28, wherein each income/operational statement is comprised of financial and operational terms including revenue, cost-of-goods, gross profit, EBIT, factory utilization, and market penetration.
30. (Previously Presented) A method as recited in claim 29, wherein a set of the partial income/operational statements are stored within a table.
31. (Previously Presented) A method as recited in claim 30, wherein a maximum revenue value, a maximum profit value, a plurality of factory utilization values, and the market penetration value corresponding to a market penetration goal are identified along with corresponding prices.
32. (Previously Presented) The method as described in claim 1, wherein the expected probability of a customer purchase is determined for the optimal price.
33. (Previously Presented) A method as recited in claim 1, wherein the actual probability of customer purchases is calculated by dividing the

number of customer purchase orders by the number of customer exposures.

34. (Previously Presented) A method as recited in claim 1, wherein an actual probability of customer purchase is compared with an expected probability of customer purchase.
35. (Previously Presented) A method as recited in claim 34, wherein the difference between an actual and an expected probability of customer purchase is calculated.
36. (Previously Presented) A method as recited in claim 35, wherein the updated price-frequency mathematical distribution is calculated so as to minimize a difference between an actual and expected probability of customer purchase.
37. (Previously Presented) A method as recited in claim 36, wherein the updated optimal price is calculated based on an updated price-frequency mathematical distribution.
38. (Previously Presented) The method as described in claim 37, wherein the actual winrate is calculated by dividing a sum of wins by a value for competition.
39. (Previously Presented) The method as recited in claim 1, wherein the result includes factory utilization.
40. (Previously Presented) The method as recited in claim 1, where in the result includes market penetration.

**IX APPENDIX LISTING ANY EVIDENCE RELIED ON BY THE APPELLANT
IN THE APPEAL (37 C.F.R. § 41.37(c)(1)(ix))**

There is no such evidence.

In the event a telephone conversation would expedite the prosecution of this application, the Examiner may reach the undersigned at (408) 971-2573. For payment of any additional fees due in connection with the filing of this paper, the Commissioner is authorized to charge such fees to Deposit Account No. 50-1351 (Order No. ABE1P002).

Respectfully submitted,

By: _____

Kevin J. Zilka

Reg. No. 41,429

Date: _____

16/25/05

Zilka-Kotab, P.C.
P.O. Box 721120
San Jose, California 95172-1120
Telephone: (408) 971-2573
Facsimile: (408) 971-4660